

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KENNETH FLEMING, JOHN DOE, R.K., and
T.D.,

Plaintiffs,

v.

THE CORPORATION OF THE PRESIDENT
OF THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS, a Utah corporation
sole, a/d/a "MORMON CHURCH"; LDS
SOCIAL SERVICES a/d/a LDS, a Utah
corporation,

Defendants.

NO. 04-2338 RSM

DEFENDANT'S RESPONSE TO
PLAINTIFF'S MOTIONS IN LIMINE

**NOTE ON MOTION CALENDAR:
SEPTEMBER 15, 2006**

ORAL ARGUMENT REQUESTED

Defendant The Corporation of The President of The Church of Jesus Christ of Latter-Day
Saints ("COP") submits the following response to Plaintiff's Motions In Limine. For ease of
reference, COP's numbered headings correspond to the numbering in Plaintiff's Motion.

1. No Reference to Settlement Offers, Demands, Negotiations or Discussions.

No objection.

**2. No Display of Exhibits Before the Jury Until it is Admitted or Permission
Obtained from the Court.**

No objection.

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTIONS IN
LIMINE - 1
No. 04-2338 RSM

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1 **3. No Reference to Plaintiffs' Attorneys' Practice.**

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3 No objection.

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5 **4. Exclusion of Witnesses from the Courtroom.**

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7 No objection.

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9 **5. Prohibition on Introducing Testimony of "Anger Management" Issues.**

10 **(a) General Response**

11 This motion is so broadly worded, and the precise relief sought so unclear, that it is
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13 difficult for COP to respond. As noted in Plaintiff's Motion, he was seen by therapists at Anger
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15 Control Treatment and Therapies, Inc. (ACT&T). COP intends to call one or more of these
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17 witnesses at trial. Also, COP took the preservation deposition of Souhir Ben Hamida, another
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19 therapist with whom Plaintiff consulted, and will offer this into evidence. The testimony of these
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21 therapists would be relevant and admissible on at least the following subjects: (1) admissions
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23 made by Plaintiff during intake or counseling sessions, including statements that the sexual abuse
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25 occurred when he was six years old, that his mother was an alcoholic and that his father beat him
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27 with a golf club; (2) authentication of questionnaires filled out by Plaintiff, such as self-reported
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29 assessments of mental health, which contradict his claims of emotional distress; and (3) opinions
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31 relevant to Plaintiff's mental health. Hence, if Plaintiff is including such evidence within his
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33 motion to exclude "Anger Management" issues, the motion must be denied.

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36 However, if Plaintiff's motion is limited simply to excluding from evidence the *reason* he
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38 was seen by these therapists, that is, the accusations of domestic violence, COP has no objection
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40 to that limitation. Thus, for example, otherwise admissible documents could be redacted to
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42 exclude reference to allegations of domestic violence or abuse of his son.

1 **(b) Exclusion of Documents Obtained from ACT&T**

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3 There are two broad categories of documents that fall within the rubric of "ACT&T
4 records." The first category is clearly admissible, subject only to relevance. These documents
5 are questionnaires or tests filled out by Plaintiff. Such documents are admissions under FRE
6 801(d)(2).
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10 The second category are notes and reports of therapists who interviewed or provided
11 treatment to Plaintiff. Although these are hearsay, such notes and reports may be admissible
12 under FRE 803(5) if the therapist/author "once had knowledge [of the matter] but now has
13 insufficient recollection." *See, Forbis v. McGinty*, 292 F. Supp. 2d 160 (D.Me. 2003) (notes in
14 ER record regarding source of plaintiff's injury are admissible; denying plaintiff's motion to
15 exclude). These records cannot be summarily excluded.
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18 Moreover, COP understood that, as in many other personal injury cases, the parties
19 jointly waived the hearsay objection as to Plaintiff's medical records. Indeed, Plaintiff himself
20 listed such records as exhibits on his Pretrial Statement; Plaintiff's Exhibit 1 is "Medical and
21 psychological records of Robert Kelly." Declaration of Michael Rosenberger, Exhibit 1.
22 Plaintiff cannot selectively pick and choose from his medical records.
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25 Finally, COP notes that, substantively, the evidence likely will be admitted anyway
26 through the live testimony of the therapists and defendant's psychological expert, Dr. Wise, who
27 will refer to the substance of these records in his own testimony under FRE 703.
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30 **(c) Dr. Ben Hamida's Testimony is Admissible**

31 Plaintiff's motion to exclude Dr. Ben Hamida's testimony is without merit because
32 Plaintiff's objections go to the weight of the evidence, not its admissibility. Dr. Ben Hamida
33 interviewed Mr. Kelly for a forensic examination in 2001, in the context of Mr. Kelly's dispute
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1 with his former partner relating to visitation with his son. Dr. Ben Hamida provided a battery of
2 psychological tests to develop a psychological profile. These tests included the Minnesota
3 Multiphasic Personality Inventory (MMPI), the Millon Clinical Multiaxial Inventory (MCMI)
4 and the Shipley Institute of Living Scales. Ben Hamida Dep. at 15. In her interview of him, Mr.
5 Kelly denied suicidal tendencies, (which contradicts representations he made to the expert he
6 retained for purposes of this litigation), and Dr. Ben Hamida concluded "it didn't seem like he
7 had any major psychological problems at the time." Ben Hamida Dep. at 29:17-21, 30:24-31:6.
8 Such testimony is relevant to the extent of Plaintiff's damages, as well as the credibility of his
9 self-reported information to his expert, Dr. Conte.

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19 Second, Dr. Ben Hamida noted that Plaintiff skewed his answers to fit his objective at the
20 time, which was to present himself as a secure, well-adjusted person.

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23 Essentially Mr. Kelly was quite guarded on the MMPI and the
24 MCMI and what that means is that his response set, his—the way
25 that he approached the testing experience was quite defensive. So
26 he tended to focus on positive traits and to highlight those and not
27 admit readily to more negative traits or traits that are generally
28 considered negative.

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30 So that was a very strong finding in both tests, and although
31 forensic clients often are defensive on these tests, I would say that
32 he was more than average, more than the average forensic client in
33 a custody case.

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35 Ben Hamida Dep. at 22:2-13. The relevance of Mr. Kelly highlighting his good qualities and
36 hiding his negative qualities in this context is obvious. If he was willing to skew his test results
37 when it served his interests in a custody dispute, the jury might rightly view with skepticism his
38 self-reported information to his expert in this litigation, where he now has a financial incentive to
39 maximize his emotional distress.
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1 **6. Defendant Should be Prohibited from Introducing Evidence that the Abuse**
2 **Occurred when Plaintiff was "6 Years Old."**

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4 This motion is baseless. Plaintiff essentially seeks the exclusion of this evidence because
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6 it hurts his case. This is hardly grounds for excluding evidence on what is the single most
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8 significant factual issue in the case. Plaintiff's statements to therapists are admissible under FRE
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10 801(d)(2).

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12 Plaintiff argues that his prior inconsistent statement do not satisfy the provisions of FRE
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14 608(b). That evidence rule is irrelevant. The evidence in question does not relate to "conduct of
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16 a witness," it is Plaintiff's own statement. Moreover, it is not being offered solely to attack Mr.
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18 Kelly's credibility, but is being offered for the truth of the matter asserted therein. FRE 608 is
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20 irrelevant.

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22 Plaintiff next argues that the statement "is simply not supported by the other evidence in
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24 this case." This is not a basis for excluding evidence. Plaintiff's argument simply reflects the
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26 fact that the timing of the abuse is a disputed question of fact.

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28 Finally, Plaintiff argues that admitting this evidence would put him "in the untenable
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30 position of having to explain his prior statement to the jury, while being prohibited from
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32 producing testimony from other witnesses who can corroborate the timing of his abuse."
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34 Plaintiff's Motions at 12. Plaintiff cites no evidence rule for this objection but, whatever it is,
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36 Plaintiff's argument is misguided. This Court's Order excluding the testimony of other victims
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38 excludes evidence of abuse at which Plaintiff was not present. To the extent Plaintiff seeks
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40 "corroboration," other persons present at the time that Plaintiff was abused can testify about
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42 these incidents, including the timing. Order, Dkt. #152, at 2.
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1 Finally, Plaintiff argues that admission of the statement would constitute "undue
2 prejudice." Plaintiff provides no basis for concluding that admission of his prior inconsistent
3 statement would constitute "undue prejudice." Plaintiff's argument, if it were accepted, would
4 render FRE 801(d)(2) a nullity.
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9 **7. There Should be No Argument by Either Counsel Requesting the Jurors to**
10 **Place Themselves in the Position or "Shoes" of Either Party.**
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12 No objection.
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14 **8. Personal Belief Regarding Credibility.**
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16 No objection.
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18 **9. Defendant's Response to Allegations of Sexual Abuse.**
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20 No objection.
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22 **10. First Amendment Issues.**
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24 To the extent Plaintiff is seeking only to prohibit witnesses from offering their
25 interpretation of the First Amendment, COP has no objection to the motion.
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27 COP does not understand this motion to seek to exclude testimony from Bishop Borland
28 or other witnesses regarding their interpretation of their own religious duties (e.g., Bishop
29 Borland's obligation to maintain the confidentiality of the communication from Richard Pettit).
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31 However, if Plaintiff seeks to broaden the scope of this motion, COP objects. Testimony
32 regarding a witness' faith or religious obligation does not require him to opine on a legal issue
33 and is relevant to explain, among other things, why Bishop Borland did not report the Pettit
34 communication to anyone else.
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1 **11. Plaintiff Should be Allowed to Call Records Custodians Where Necessary.**

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3 It is unclear what records and records custodians Plaintiff refers to in this motion. To the
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5 extent Plaintiff is seeking a "blank check" to call witnesses not named on the Pretrial Order or in
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7 Plaintiff's Pretrial Statement, COP objects.

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9 **12. Defendant Should be Prohibited from Introducing Evidence of "Altruistic**
10 **Acts" on the Part of The Mormon Church.**

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12 No objection.

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14 **13. Prohibition Regarding Effect of a Verdict on The Mormon Church.**

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16 No objection.

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18 **14. Prior Inconsistent Statements by Plaintiff.**

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20 Again, Plaintiff fails to state with specificity the scope of this motion. To the extent
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22 Plaintiff is seeking solely to exclude his prior inconsistent statements, the motion is meritless for
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24 the same reasons discussed in regard to Motion No. 6, above. His prior inconsistent statements
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26 are non-hearsay admissions of a party opponent relevant to both liability and damages. FRE
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28 801(d)(2).

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30 As discussed in prior motions, COP will not dispute that the abuse occurred, but will
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32 dispute the extent and cause of Plaintiff's damages. Subject to FRE 403 and its restriction on
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34 cumulative testimony, Plaintiff's account of Mr. Loholt's abuse of Plaintiff can be corroborated
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36 by eyewitnesses to these event. As this Court has already ruled, however, Plaintiff cannot offer
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38 the testimony of other victims regarding acts of abuse at which Plaintiff was not present.
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40 Plaintiff's effort to prove his own damages is not prejudiced in any way by the exclusion of the
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42 evidence of other victims' abuse.

1 **15. Plaintiff's Motion In Limine Re: Exhibits Sought to be Entered at Trial.**

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3 Quite unconventionally, Plaintiff seeks rulings from the Court as to the admissibility of
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5 his own potential exhibits, without even putting them before the Court. Many of these exhibits
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7 are multi-page documents, and without knowing exactly what Plaintiff intends to offer into
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9 evidence, COP objects and respectfully requests that the motion be denied until such time as the
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11 parties, and the Court, know exactly what is the subject of the motion.
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13 COP makes the following general responses, reserving the right to supplement its
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15 objections when Plaintiff either identifies the documents with specificity or offers them into
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17 evidence.
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19 **(a) Plaintiff's Proposed Exhibit #4 – Renton and Kent Stake Directories**

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21 Plaintiff's Pretrial Statement lists this exhibit as follows: "Renton and Kent Stake
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23 Directories 1969 through 1980." As an initial matter, COP is unaware of a stake directory for
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25 1969, and thus is unclear what document from that era Plaintiff intends to offer. COP also
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27 objects to the admission of stake directories after the period "1973-1974." As addressed in
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29 COP's own motions in limine, events after January 1973 are irrelevant. Dkt. # 161 at 4. Plaintiff
30
31 has admitted that he was abused during the period of time that Jack Loholt lived at the Allenbach
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33 home. Mr. Loholt purchased a house in January 1973 and moved out of the Allenbach residence.
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35 Hence, the focus of the trial is necessarily on events prior to January 1973, and stake directories
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37 from 1974 through 1980 are irrelevant.
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(b) Plaintiff's Proposed Exhibit #5 – Church Historical Record of Changes of Officers, Teachers and Board Members of Kent 2nd Ward for Years 1973-1975.

COP has no objection to the admissibility of the ward historical record for 1971-1972.

As Plaintiff points out, this does, indeed, show the precise date Bishop Borland removed Loholt as Assistant Scout Master—February 6, 1972.¹

COP objects to admission of the historical documentation for 1973-1975. Given that it is undisputed that Loholt's abuse of Plaintiff preceded January 1973, it is irrelevant that Loholt purportedly was granted positions with the Scouts in October 1973 or May 1974. Plaintiff's motion fails to articulate the relevance of positions that Loholt had after he abused Plaintiff.

This motion must be denied.

Moreover, introduction of such evidence is highly prejudicial. Plaintiff clearly desires to have the jury punish the Church for not "getting it" and purportedly putting Loholt back into a Scouting position after the Church had notice of his abuse of minors. Even if it had relevance, which COP disputes, such post-1973 relationship between Loholt and the Boy Scouts should be excluded under FRE 403.

(c) Plaintiff's Proposed Exhibit #9 – Articles of Incorporation

The Articles of Incorporation for COP and LDS Social Services are irrelevant. COP does not understand Plaintiff's argument as to the purported relevance of the Articles of Incorporation. Regarding Plaintiff's contention that the jury needs evidence of who the corporate sole is so they understand why COP is the responsible party in this case, COP anticipates that this issue can be handled with a simple jury instruction stating that COP is the corporation the Church organized to carry out non-religious activity, which includes being sued.

¹ The ward historical record does not show that Bishop Borland referred Loholt to sexual deviancy treatment, contrary to Plaintiff's representation on page 17 of his motion.

(d) Plaintiff's Proposed Exhibit #11 – Excerpts from Encyclopedia of Mormonism, Priesthood and Church Organization

This document lacks foundation and is hearsay. Plaintiff offers no support for his claim that it is a publication of COP. To the contrary, the last paragraph of the *Encyclopedia's* preface states:

Lest the role of the *Encyclopedia* be given more weight than it deserves, the editors make it clear that those who have written and edited have only tried to explain their understanding of Church history, doctrines, and procedures, *their statements and opinions remain their own*. The *Encyclopedia of Mormonism* is a joint product of Brigham Young University and Macmillan Publishing Company, and *its contents do not necessarily represent the official position of The Church of Jesus Christ of Latter-day Saints*.

Rosenberger Decl. Ex. 2 (emphasis added). The *Encyclopedia* is not a publication of COP, or The Church of Jesus Christ of Latter-day Saints. It is, therefore, not the statement of a party opponent under FRE 801.

It also does not satisfy the “learned treatise” exception to the hearsay rule, FRE 803(18), because Plaintiff will not be using it in connection with presentation of expert testimony. In fact, Plaintiff has no liability expert or expert regarding the Church in general.

Plaintiff has also not provided COP or the Court with the excerpts of the *Encyclopedia* he would seek to offer into evidence. COP thus reserves the right to make additional objections, such as relevance.

(e) Plaintiff's Proposed Exhibit #12 – Mandatory Reporting Statute

COP opposes the admission of the mandatory reporting statute for the reasons stated in its own motion in limine and reply brief in support thereof, Dkt. Nos. 140 and 166.

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II. CONCLUSION

For the reasons stated above, COP respectfully requests that the Court deny the Plaintiff's motions to the extent objected to by COP.

DATED this 11th day of September, 2006.

GORDON MURRAY TILDEN LLP

By 

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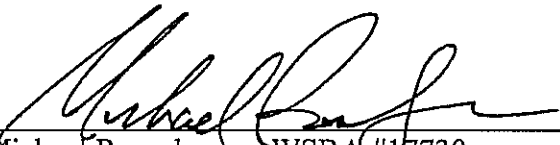
Attorneys for Defendant The Corporation of the
President of The Church of Jesus Christ of
Latter-Day Saints

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following. The parties will additionally be served in the manner indicated.

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